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Via Hand Delivery

Carole Jones, Circuit Clerk
Wood County Circuit Court
Wood County Judicial Office
#2 Government Square, Room 133
Parkersburg, WV 26102

Re: State of West Virginia ex rel Patrick Morrissey, Attorney General vs.
Diocese of Wheeling-Charleston and Michael J. Bransfield in his Capacity
as former Bishop of the Diocese of Wheeling-Charleston
Civil Action No. 19-C-69

Dear Ms. Jones:

With regard to the above-referenced matter, enclosed are an original and one copy of:

1. Diocese of Wheeling-Charleston's and Michael J. Bransfield's Motion to Dismiss The Attorney General's Complaint;
2. Diocese of Wheeling-Charleston's and Michael J. Bransfield's Memorandum of Law in Support of Their Motion to Dismiss The Attorney General's Complaint; and
3. Diocese of Wheeling-Charleston's and Michael J. Bransfield's Motion for Leave to Exceed the Twenty Page Memorandum Limit with proposed Order;

Please kindly file the original with the Court and return a date-stamped copy.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,


JAMES C. GARDILL

JCG/bn

Enclosures

cc: Honorable Judge John D. Beane (w/encls.)

✓ Patrick Morrissey, Esq., State of West Virginia Attorney General (w/encls.)

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA *ex rel.*
PATRICK MORRISEY, ATTORNEY GENERAL,

Plaintiff,

v.

CIVIL ACTION NO. 19-C-69
Honorable Judge John D. Beane

DIOCESE OF WHEELING-CHARLESTON
And MICHAEL J. BRANSFIELD in his Capacity
as former Bishop of the Diocese of Wheeling-Charleston,

Defendants.

**DIOCESE OF WHEELING-CHARLESTON'S AND MICHAEL J. BRANSFIELD'S
MOTION TO DISMISS THE ATTORNEY GENERAL'S COMPLAINT**

NOW COME, the Defendants, the Diocese of Wheeling-Charleston and Michael J. Bransfield (collectively herein "DWC"), by and through its undersigned counsel, pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure and request an Order from this Honorable Court dismissing the Attorney General's Complaint for failure to state a claim upon which relief may be granted.

In support of this Motion, the Defendants incorporate their Memorandum of Law in Support Thereof, which was filed this same date and provides compelling reasons to dismiss the Complaint, including but not limited to:


1. The AG fails to allege that the DWC violated the WVCCPA as it pertains to credit sales, consumer loans and consumer leases; rather, the AG's allegations relate to the language on the DWC's website stating that it provides a safe school environment.
2. Catholic Schools are not "goods or services" under the WVCCPA; therefore, the Attorney General has no authority to maintain its lawsuit against the DWC as the

West Virginia legislature has separately regulated Catholic Schools pursuant to W.Va. Code §18-3-1 et. seq.

3. The AG's Complaint contains two counts alleging violations of the CCPA that do not adequately plead unfair or deceptive acts: Count I alleges that the DWC failed to deliver advertised services and Count II alleges that it failed to warn of dangerous services in violation of the "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce..." language of the Act.
4. The AG is not entitled to the relief sought because none of the conduct that he alleges occurred within the four year look back period of the CCPA.
5. The AG inappropriately uses Catholic Schools as the doorway by which to enter the realm of separation of church and state by alleging that Catholic Schools are currently engaged in "unfair or deceptive acts or practices" when the DWC states on its website that it has a safe school environment. The AG alleges that the website statement made by the DWC *after* its adoption of the Charter for the Protection of Children and Young People ("Charter") in 2002, which reflects the implementation of the Charter's "safe environment program", is illegal because, in some years *prior* to the adoption of the Charter, it is alleged that five persons might have served in work associated with schools somewhere in the state. Such claims are impermissible and unconstitutional.

WHEREFORE, the Defendants, the Diocese of Wheeling-Charleston and Michael J. Bransfield, pray that this Court dismiss this action, with prejudice, and grant all additional and further relief as the Court deems appropriate.

DIOCESE OF WHEELING-CHARLESTON
AND MICHAEL J. BRANSFIELD,
By Counsel


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the ~~18th~~ day of April, 2019, the foregoing the *Diocese of Wheeling-Charleston's and Michael J. Bransfield's Motion to Dismiss Plaintiff's Complaint* was served on opposing counsel by mailing a true copy via first-class U.S. Mail postage prepaid to:

Patrick Morrissey, Esq
State of West Virginia Attorney General
Post Office Box 1789
Charleston, WV 25326-1789


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IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
PATRICK MORRISEY, ATTORNEY GENERAL,

Plaintiff,

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CIVIL ACTION NO. 19-C-69
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DIOCESE OF WHEELING-CHARLESTON
And MICHAEL J. BRANSFIELD in his Capacity
as former Bishop of the Diocese of Wheeling-Charleston,

Defendants.

**DIOCESE OF WHEELING-CHARLESTON'S AND MICHAEL J. BRANSFIELD'S
MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS THE
ATTORNEY GENERAL'S COMPLAINT**

NOW COME, the Defendants, the Diocese of Wheeling-Charleston and Michael J. Bransfield (collectively herein "DWC"), by and through its undersigned counsel, and for their Memorandum of Law in Support of their Motion to Dismiss the Attorney General's Complaint pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure for failure to state a claim upon which relief may be granted, respectfully submit as follows:

I. INTRODUCTION

The allegations of the Complaint reveal yet another attempt by the Attorney General ("AG") to exploit the ambiguities and limitations of the "unfair or deceptive" acts provisions of the West Virginia Consumer Credit and Protection Act ("CCPA") to assert jurisdiction in an area of the law, operation of parochial schools, that the Legislature simply did not grant. Moreover and in particular, the safety of Catholic Schools is clearly covered in a specific legislative and statutory scheme outside the scope of the CCPA and outside the jurisdiction of the AG. The AG makes broad, sweeping allegations that inappropriate conduct attributed to priests of the DWC,

much of which occurred decades ago, creates an “unsafe environment” in the Catholic School system now, triggering a duty to warn under the “unfair or deceptive” advertising provisions of the CCPA.

In his attempt to bring decades-old predicate acts under the CCPA umbrella, the AG relies upon the current “Safe Environment Program” language on the DWC website. That website is neither “unfair [nor] deceptive” and accurately describes the program used by DWC to fulfill requirements under the U.S. Roman Catholic Bishops’ “Charter for the Protection of Children and Young People. [See footnote 16]. Not only is this information and program outside the provisions of the CCPA, the AG’s argument rests on decades old allegations immaterial to whether there is currently an unsafe environment. The AG’s factual leap is a transparent attempt to overcome the glaring disconnect between the decades old allegations and the current environment of Catholic Schools. To support his factual leap, the AG ignores the current Safe Environment Program which has governed the DWC and its schools over the past twenty years.

This case is somewhat unique as the DWC has been cooperating with the AG for months in response to subpoena requests. It has provided thousands of pages of documents and files concerning historical allegations of abuse by clergy and others within its various churches, parishes and schools. Thus, significant information has already been provided. However, the AG has given only passing acknowledgment to the DWC’s own work in identifying and expelling offenders, identifying and assisting victims and proactively educating and protecting young people and adults from harm. More importantly, the AG ignores the actual information he has in those records in filing this Complaint.

The DWC conducted an exhaustive search of its own records. It voluntarily released a list of credibly accused clergy which included a service history within the DWC of everyone

credibly accused, the date of occurrence and type of allegations asserted, and the dates when those allegations were reported to the DWC. It separately provided to the AG extensive files on those accused which were not deemed “credible” as determined by the DWC along with the basis for such determination.

Under the provisions of the Charter, the DWC has advertised extensively how members of the public including the Catholic community can report allegations of abuse and misconduct to civil and/or Diocesan authorities through its own communication channels, over the internet and in external communications. It utilizes an independent lay board to receive and review all such allegations.¹ It has created a Safe Environment Program, including full time staff and a network of staff and volunteers, to both source and elevate allegations of abuse and educate its own clergy, employees, volunteers, lay people, students and teachers on how to report such conduct and how to identify warning signs of abuse. In point of fact, the DWC provided to the AG records of background checks done over the last approximate twenty years involving all such clergy, employees and volunteers which disclosed in excess of 19,000 background checks completed.²

It maintains a zero tolerance policy for those credibly accused and it complies with the mandatory reporting requirements of West Virginia law. No other school system in the State of

¹ The Charter provides in Article 12 that the Diocese must “maintain ‘safe environment’ programs which the ... bishop deems to be in accord with Catholic moral principles. They are to be conducted cooperatively with parents, civil authorities, educators, and community organizations to provide education and training for minors, parents, ministers, employees, volunteers, and others about ways to sustain and foster a safe environment for minors.” Article 13 requires that the background of all clergy, employees and volunteers be subjected to screening “utiliz[ing] the resources of law enforcement and other community agencies.” And Article 12 demands that these efforts be public: “Dioceses/eparchies are to make clear to clergy and all members of the community the standards of conduct for clergy and other persons with regard to their contact with minors.”

² For example, since 2011, ScreeningOne has checked credit reports for fraud, social security records, county criminal records and the national criminal database, including a search for sex offenders. Prior to that, USIS conducted background checks starting in 2004 and before that, it was Mind Your Business.

West Virginia has done so much.³

Even though the AG was provided with this information and more, little to no mention of it was made in the Complaint. Notwithstanding the failure to acknowledge these ongoing efforts, the AG seeks equitable remedies to restrain alleged conduct which is not currently demonstrable and is inconsistent with the records and information in the possession of the AG.

Neither do the predicate acts of historical abuse have any relationship to the operation of Catholic Schools. There is no tie between priests and schools under the allegations of the Complaint and historically it is demonstrated that access came through ministry, and not schools.

It is also clear that the operational aspects of Catholic Schools are clearly intended by the Legislature to be governed by a comprehensive statutory framework outside the scope of the CCPA. That comprehensive framework provides clear statutory and regulatory oversight which specifically includes the health and safety of students. As such, it is apparent that the Legislature did not intend to further regulate Catholic Schools in an ambiguous provision of the CCPA nor give the AG enforcement authority over the operation of schools when that is governed by a separate regulatory body specifically charged with that authority.

II. STANDARD OF REVIEW

A trial court should grant a motion to dismiss pursuant to West Virginia Rule of Civil Procedure 12(b)(6) if the plaintiff has failed to state a claim upon which relief can be granted. W.Va. R. Civ. P. 12(b)(6). The sole purpose of a Rule 12(b)(6) motion to dismiss is to test the legal sufficiency of the complaint. *State ex rel. McGraw v. Scott Runyan Pontiac, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995); accord syl. pt. 2 *Nolan v. Virginia Ins. Reciprocal*, 224 W.Va. 372, 686 S.E.2d 23 (2009). Although the court must construe the complaint in the light

³ Allegations of abuse of a minor triggers mandatory reporting obligations of both clergy and school personnel. W.Va. Code §49-2-803.

most favorable to the plaintiff and consider all allegations contained therein as true, *Sedlock v. Moyle*, 222 W.Va. 547, 550, 668 S.E.2d 176, 179 (2008), this “liberal standard does not relieve a plaintiff . . . of the obligation of presenting a valid claim, that is a claim upon which relief can be granted.” *Wilhelm v. W.Va. Lottery*, 198 W.Va. 92, 96-97, 479 S.E.2d 602, 606-607 (1996). Accordingly, a motion to dismiss must be granted where “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Roth v. Defelicecare, Inc.*, 226 W.Va. 214, 219, 700 S.E.2d 183, 188 (2010) (quoting *Chapman v. Kane Transfer Co.*, 160 W.Va. 530, 236 S.E.2d 207 (1977)).

III. COMPLAINT ALLEGATIONS – FACTUAL INACCURACIES

The West Virginia AG filed a Complaint in the Circuit Court of Wood County against the DWC and Michael J. Bransfield, as former Bishop of the DWC.⁴ The factual allegations of the Complaint appear to be intentionally vague in an attempt to create two novel causes of action under the West Virginia CCPA. Both of the Counts are based upon language on the DWC website under the heading “Frequently Asked Questions” under the Catholic Schools section. Under the “How safe are the Catholic schools?” section, the language states:

Providing a safe learning environment is inherent in the mission of our Catholic Schools. School employees and volunteers must pass a national background check, be fingerprinted and trained according to the Diocesan Safe Environment Policy (VIRTUS).

Each school has an Emergency Response Plan for Emergencies that is put into practice on a regular basis. Safety measures are in place at all of our schools. [Complaint ¶ 23].

⁴ The AG’s Complaint is compiled, in part, from tens of thousands of pages of information that the DWC produced pursuant to an AG Subpoena. The AG ignored and did not address in his Complaint, much of the exculpatory information.

The AG applies the current web site language to sexual abuse events that happened many years and even decades ago to allege such historical events create a current day risk to the safety of Catholic School children thereby demanding extraordinary relief.

Count I alleges a claim of advertised services not delivered pursuant to West Virginia Code §46A-6-104 which prohibits “Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce....” [Complaint ¶¶ 67-72]. This allegation is based upon the theory that although the DWC advertised on its website that it offers a safe learning environment for students in its schools and children attending its recreational camps, it failed to clearly and conspicuously disclose that the learning environment is not safe as advertised due to its decades old claims of sexual abuse of minors by priests. [Complaint ¶ 71].

Count II alleges a claim of failure to warn of dangerous services pursuant to West Virginia Code §§46A-6-104 and 46A-6-102(7)(L) and (M). [Complaint ¶¶ 73-76]. That code section (102(7)) sets forth sixteen examples of unfair methods of competition and unfair or deceptive acts, three of which are cited by the AG: false advertising; conduct that is likely to confuse or create misunderstandings among credit consumers; and deceptive or fraudulent conduct. The Complaint contains five examples consisting of conduct of priests and employees in the DWC extending back decades ago. The examples are discussed in chronological order below.

The AG’s first example involves decades old claims against Victor Frobias, who has multiple allegations ranging from 1962 through 1987, not all of which occurred in the DWC. The AG alleges that Frobias’ 1962 allegations were known by Bishop Hodges before Frobias came to the DWC. [Complaint ¶¶ 40 & 41]. The AG alleges that despite having sexual abuse

allegations lodged against him, the DWC alternated Frobass' treatment with new assignments, including at Camp Tygart and Wheeling Central Catholic High School.⁵ [Complaint ¶¶ 36 - 49].

Although it cannot be disputed that Frobass is a bad actor, it should be noted that the last DWC allegations were in the late 1970s, approximately 25 years before the Safe Environment Program was implemented and approximately forty years before the filing of the AG Complaint.⁶ Nevertheless, the AG fails to allege in his Complaint how forty year old and more allegations create a current unsafe environment in Catholic Schools.

A second example relied upon by the AG is Patrick Condron. The allegations against him involve one accuser which occurred sometime between 1983 and 1987 at a Diocesan Seminary – not a Catholic High School - which has been closed for decades. The AG alleges that Condron admittedly had a relationship with a student during that time period that involved long embraces, kissing and an attempt at intercourse. [Complaint ¶ 27]. The AG alleges that Bishop Schmitt sent Condron to St. Michael's Community and Jemez Springs for substance abuse treatment and psychotherapy. [Complaint ¶ 29]. The AG alleges that Bishop Schmitt returned Condron to active ministry by placing him first at a parish, and then at Wheeling Catholic Elementary from 1998-2001. [Complaint ¶ 30]. The AG alleges that the DWC did not tell parents about Condron's background. [Complaint ¶ 31]. However, the AG has not alleged how decades old conduct creates a current unsafe environment in Catholic Schools.

The AG makes a third allegation that does not involve abuse; rather, it is an allegation of failure to do a background check. The AG alleges that Bishop Schmitt hired an unnamed religious order priest who admitted on a 2002 application that he was accused of sexual abuse of

⁵ Although not dispositive of this Motion, it should be noted that during this time period the psychiatric community believed that people like Frobass could be cured and advised that they were able to return to ministry after treatment.

⁶ Although not dispositive of this Motion, Frobass left the DWC in 1983 and the DWC suspended his faculties which were eventually revoked in 1987. He died in 1993.

a child in 1979.⁷ [Complaint ¶¶ 33 & 35]. The AG alleges that rather than conduct a background check on the priest, the DWC simply called the Archdiocese of Baltimore to inquire regarding allegations. [Complaint ¶ 36]. The priest agreed to leave his assignment due to “the situation” in 2007, after four years of service at a parish that operates an elementary school.⁸ [Complaint ¶¶ 38 & 39].

The AG alleges that the failure to promptly conduct a background check was a violation of the safe environment language on the DWC’s website; however, the AG ignores the telephone call to the Archdiocese of Baltimore which is a background check, and a letter from the priest’s religious order which confirmed his good standing, akin to calling past employers in public employment. If the allegations are taken as true, the facts show that the DWC did not misrepresent that it does background checks. The AG fails to allege how decades old conduct creates a current unsafe environment in Catholic Schools.

A fourth example relied upon by the AG describes conduct of an unnamed individual who, in 2018, was alleged to have sexually abused students in 1978-79 while he was a high school principal, prior to his becoming a priest in 1993. He was also accused of boundary violations of a non-sexual nature with boys in 2005. However, his faculties were suspended and he voluntarily left the ministry in 2005.

The AG alleges that the DWC failed to conduct a background check. [Complaint ¶¶ 59]. However, the AG fails to allege that the report of the 1978-79 conduct was not received until 2018, thirteen years after he left the ministry and approximately 40 years after the alleged

⁷ The AG verbally provided to the DWC the identity of the priest. The spreadsheets provided to the AG by the DWC show that the priest underwent multiple background checks with no criminal conduct disclosed.

⁸ Although not dispositive of this Motion, pursuant to the AG subpoena, the DWC provided the priest’s file to the AG, which documents that the priest suffered from debilitating sciatica which prevented him from conducting his ministerial duties. It also documents that the priest disclosed the allegation and that his religious order confirmed in writing that there was nothing in his background that would preclude his fitness for ministry. Documents provided to the AG by the DWC also show that background checks were performed on the priest.

occurrence, which the Diocese promptly reported to local authorities. The AG also does not allege how a decades old allegation creates a current unsafe environment in Catholic Schools.

The final allegation is the most recent allegation and does not involve sexual abuse in the DWC. It is based on an alleged failure to conduct a background check on Ronald Cooper, a maintenance worker at Weirton Madonna High School (erroneously identified as a teacher in the Complaint). [Complaint ¶¶ 53-57]. The AG alleges that Cooper failed to disclose on his 2011 employment application that he had been convicted of Third Degree statutory rape in 1985 in Washington State. [Complaint ¶ 54]. The AG alleges that the DWC did not conduct a criminal background check on Cooper until 2013 after Cooper had been at Weirton Madonna for two years.⁹ [Complaint ¶ 54]. Files previously provided to the AG pursuant to subpoena prior to filing the Complaint conclusively show he did undergo multiple background checks.

Although the AG concedes that the DWC immediately terminated Cooper's employment, it alleges that the DWC did not disclose Cooper's history to parents and students.¹⁰ [Complaint ¶ 56]. The AG alleges that the failure to promptly conduct a background check was in violation of the safe school environment language on the DWC's website. In reality, if taken as true, the facts do not show that the DWC misrepresented that it does background checks; it merely shows that the early background checks did not identify the 1985 conduct.

IV. ARGUMENT AND LAW

A. PURPOSE AND SCOPE OF CCPA.

⁹ Although not dispositive of this Motion, the two spreadsheets provided to the AG's office show that he did undergo multiple background checks.

¹⁰ This allegation appears throughout the Complaint. Although not dispositive of this Motion, the DWC provided to the AG two lists that it published of clergy that served in the DWC that were credibly accused of abuse either in the DWC or elsewhere. The DWC also provided copies of the Catholic Spirit Magazine from 1974 to current which are provided to all DWC church families, many of which beginning in 2003 contain advertisements providing a hotline number for victims of abuse to call.

Before addressing the fatal flaws in the AG's Complaint, a discussion of the background and purpose of the CCPA is necessary. The CCPA "was enacted in 1974 and is a hybrid of the Uniform Consumer Credit Code and the National Consumer Act and some sections from then-existing West Virginia law." *White v. Wyeth*, 227 W.Va. 131, 136, 705 S.E.2d 828, 833 (2010) (citing *Clendenin Lumber and Supply Co., Inc. v. Carpenter*, 172 W.Va. 375, 379 n. 4, 305 S.E.2d 332, 336 n. 4 (1983)). "The dual legislative purpose underlying the CCPA is to protect consumers and promote sound and fair business practices." *Id.*, 227 W.Va. at 139, 705 S.E.2d at 836. The CCPA "is a comprehensive attempt on the part of the West Virginia legislature to extend protection to consumers and persons who obtain credit in state." *Harper v. Jackson Hewitt, Inc.*, 227 W.Va. 142, 151, 706 S.E.2d 63, 72 (2010).

The purpose of the CCPA is to protect consumers from unfair, unconscionable, fraudulent, and abusive practices of debt collectors. W.Va. Code §46A-1-101, et seq. *Chevy Chase Bank v. McCamant*, 512 S.E.2d 217, 204 W.Va. 295 (1998).

The Legislature, in enacting the CCPA, sought to eliminate the practice of including unconscionable terms in consumer agreements covered by the Act and, to further this purpose, the legislature created a cause of action for consumers and imposed civil liability on creditors who include unconscionable terms in consumer agreements. W.Va. Code §46A-1-101, et seq.; §46A-5-101(1); §46A-2-121; *Arnold v. United Companies Lending Corp.*, 511 S.E.2d 854, 204 W.Va. 229 (1998).

B. THE AG'S COMPLAINT MUST BE DISMISSED BECAUSE IT FAILS TO ALLEGE A VIOLATION RELATED TO A CONSUMER CREDIT SALE, CONSUMER LOAN, OR A CONSUMER LEASE.

It is undisputed that the AG's authority under the CCPA is limited to claims involving consumer credit sales, consumer loans and consumer leases. The CCPA does not give the AG

unlimited jurisdiction to bring any conceivable claim related to consumer transactions, advertisement and the like. In this case, as established above, the AG does not allege that the DWC violated the CCPA as it pertains to credit sales, consumer loans and consumer leases; rather, the AG's allegations relate to the language on the DWC's website stating that it provides a safe school environment. Under the AG's theory that any "deceptive advertising" equals a violation of the CCPA, there is no end to the AG's authority – anybody accused of deceptive advertising would be subject to the CCPA. The Legislature never intended to give the AG such broad and sweeping authority.

In fact, the Supreme Court has reined in the AG's attempts to use its statutory provisions to intrude on other regulated areas on other occasions. In *State ex rel. McGraw v. Bear, Stearns & Co.*, 217 W.Va. 573, 576, 618 S.E.2d 582, 585 (2005), the Supreme Court halted the AG's attempt to utilize the unfair or deceptive acts provision of the CCPA to bring a claim based upon conduct that is ancillary to the general business of buying and selling securities. In *State ex rel. Morrissey v. Copper Beech Townhome Communities Twenty-Six, LLC*, 239 W.Va. 741, 747, 806 S.E.2d 172, 175, 178 (2017), the Supreme Court denied the AG's attempt to expand the CCPA to regulate residential leases of real property entered into by a landlord and tenant.

It is clear that for the CCPA to apply, the offending conduct must be related to the extension of consumer credit. The CCPA "is a comprehensive attempt on the part of the West Virginia legislature to extend protection to consumers and persons *who obtain credit* in state." *Harper v. Jackson Hewitt, Inc.*, 227 W.Va. 142, 151, 706 S.E.2d 63, 72 (2010). (Emphasis added). Under the general statement of applicability found in Article 1 of the WVCCPA (W.Va. Code §46A-1-104), "three elements need to be satisfied for the CCPA to apply: 1) a creditor 2) induces a consumer 3) *to enter into a consumer credit sale, a consumer*

loan, or a consumer lease.” State ex rel. Morrissey v. Copper Beech Townhome Communities Twenty-Six, LLC, 239 W.Va. 741, 747, 806 S.E.2d 172, 175, 178 (2017). (Emphasis added).

The fact that the CCPA is limited to the extension of credit to a consumer was established by the foremost expert in this area of the law, Professor Vincent Cardi. In his oft cited Law Review Article on the CCPA, Professor Cardi articulated purposes of the CCPA, as follows:

The West Virginia Consumer Credit and Protection Act is intended to: (1) increase the availability of consumer credit by raising allowable finance charges (interest rates) and move toward equalization of rates available to consumers whether they borrow the money from a lender or buy the goods on credit from a seller; (2) regulate the rate of finance charges allowed for consumer credit transactions by prescribing rates and rules for computation; (3) regulate those businesses which make small consumer loans and which were formerly regulated by the small loan act; (4) protect consumers who purchase goods or services on credit or through consumer loans from deceptive selling techniques, unconscionable contract terms, and undesirable debt recovery and collection practices; and (5) protect consumers who purchase goods or services for cash or credit from, and to give them remedies for, defective or shoddy goods and services and unfair and deceptive selling practices.

V. Cardi, *The West Virginia Consumer Credit and Protection Act*, 77 W.Va. L. Rev. 401, 402 (1975).¹¹ It is well established that the AG has no common law authority and his power is limited to that granted by the Legislature. *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 777, 461 S.E.2d 516, 523 (1995). It is also well established that the AG’s power granted through the CCPA is limited to consumer credit sales, consumer loans, or consumer leases, as noted above.

The allegations contained in the AG’s complaint have nothing to do with the financial aspects of consumer contracts for such services, extensions of credit or disclosures related to such extensions of credit; have nothing to do with the sale of services on credit; and have nothing

¹¹ This article has been cited with approval by the W.V. Supreme Court in several decisions. See *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 780, 461 S.E.2d 516, 526 (1995); *State ex rel. McGraw v. Bear, Stearns & Co.*, 217 W.Va. 573, 578, 618 S.E.2d 582, 587 (2005); *State ex rel. Morrissey v. Copper Beech Townhome Communities Twenty-Six, LLC*, 239 W.Va. 741, 744, 806 S.E.2d 172, 175 (2017).

to do with a consumer incurring a debt pursuant to a revolving charge account. Without such allegations, the general provisions of the CCPA do not apply to this case and it must be dismissed.

The CCPA is made up of eight distinct articles. The Supreme Court requires that statutes which relate to the same subject matter be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments." Syl. Pt. 3, *Smith v. State Workmen's Compensation Com'r*, 159 W.Va. 108, 219 S.E.2d 361 (1975). The main provisions of the CCPA encompass a large area of law involving consumer credit transactions.¹² However, not one of the articles involve regulating schools. On the contrary, the Legislature has enacted a separate legislative scheme directed solely at regulating schools. West Virginia Code §18-1-1 *et seq.* not only specifically regulates safety aspects of education, as described in detail below, it contains forty-six (46) Articles, with approximately six hundred and twenty-nine (629) Sections governing every aspect of grade school, middle-school and high school education in the State. Not only did the Legislature fail to include any explicit direction stating that the CCPA applies to schools, the Legislature clearly intended for West Virginia Code §18-1-1 *et seq.* to explicitly govern the operation of schools in the State.

In preparing its Motion to Dismiss, the DWC has conducted a thorough review of the CCPA and believes that it has analyzed all West Virginia cases, law review articles and secondary sources discussing the CCPA. Not one of them has stated that the purpose of the

¹² Article 2-Consumer Credit Protection; Article 2a-Breach of Security of Consumer Information; Article 3-Finance Charges and Related Provisions; Article 4-Regulated Consumer Lenders; Article 5-Civil Liability and Criminal Penalties; Article 6-General Consumer Protection; Article 6a-Consumer Protection—New Motor Vehicle Warranties; Article 6b-Consumer Protection—Automotive Crash Parts; Article 6c-Credit Services Organizations; Article 6d-Prizes and Gifts; Article 6e-Consumer Protection—Assistive Devices; Article 6f-Telemarketing; Article 6g-Electronic Mail Protection Act; Article 6h-Transfers of Right to Receive Future Payments; Article 6i-Consumer Protections in Electronic Transactions; Article 6j-Protection of Consumers from Price Gouging and Unfair Pricing Practices During and Shortly After a State of Emergency or State of Preparedness; Article 6k-Good Funds Settlement Act; Article 6l-Theft of Consumer Identity Protections; Article 6m-Storm Scammer Consumer Protection Act.

CCPA is to permit the AG to regulate the operational aspects of Catholic Schools or any private schools. Nor do they state that the AG has authority to regulate language on the DWC's website as it pertains to the operation of Catholic Schools. The CCPA is now forty-five years old and the West Virginia Supreme Court has yet to be presented with such a case. Moreover, in one of its numerous press releases on this case, the AG readily admitted that this case is the first of its kind in the nation. Despite news articles in the 1970s regarding specific allegations of abuse related to priests, prior AGs have not attempted to use the CCPA in this manner. The obvious reason is that it is outside the scope of the statute and his authority under it.

C. THE AG'S COMPLAINT MUST BE DISMISSED BECAUSE CATHOLIC SCHOOL EDUCATION IS NOT "GOODS OR SERVICES" UNDER THE CCPA.

West Virginia Code §46A-6-104 provides: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." The Legislature has enacted definitions specifically applicable to Article 6. W.Va. Code §46A-1-102. For our purposes, the question is whether a Catholic School education falls under the meaning of the terms "goods or services". It does not.

In recognizing that Article 6 does not contain specific definitions of "goods" or "services," the Supreme Court turned to the definition of the terms contained in Article 1 in the CCPA's general definitions section. *State ex rel. Morrissey v. Copper Beech Townhome Communities Twenty-Six, LLC*, 239 W.Va. 741, 750, 806 S.E.2d 172, 181 (2017). In Article 1, the term "'Goods' includes goods not in existence at the time the transaction is entered into and gift and merchandise certificates, but excludes money, chattel paper, documents of title and instruments." W.Va. Code §46A-1-102(21). The allegations in the Complaint do not describe "goods".

“Services” includes: (a) Work, labor and other personal services; (b) privileges with respect to transportation, use of vehicles, hotel and restaurant accommodations, education, entertainment, recreation, physical culture, hospital accommodations, funerals, cemetery accommodations, and the like; and (c) insurance.” W.Va. Code §46A-1-102(7). Although the definition of the term “services” includes the language “privileges with respect to . . . education”, the phrase is broad, ambiguous and undefined. “Undefined words and terms used in a legislative enactment will be given their common, ordinary and accepted meaning.” Syl. Pt. 4, *Osborne v. United States*, 211 W. Va. 667, 567 S.E.2d 677 (2002). According to Black's Law Dictionary (10th ed. 2014), the civil law definition of the term privilege is “A creditor's right, arising from the nature of the debt, to priority over the debtor's other creditors.” This common, ordinary, and accepted meaning comports with the CCPA’s intent to govern creditor-debtor relationships. The relationship between the DWC and its parishoners is not a debtor-creditor relationship. Moreover, the AG’s Complaint does not allege any claims based upon a creditor-debtor relationship.

With respect to the present issue, the CCPA mentions “education” only five times, most notably in the section on debt collection (Article 2 of the CCPA).¹³ Outside of the specific reference in the debt collection section, “education” is included in the definition of “services” contained in the general definitions section of Article 1 of the CCPA. The statutory language of the deceptive practices provision contained in Article 6 of the CCPA does not mention “education.” If the Legislature intended for the unlawful acts or practices provisions of the

¹³ The only specific power over education granted to the AG by the CCPA is that which authorized the AG to establish programs regarding the education of consumers and it is not relevant to the AG’s Complaint. W.Va. Code §46A-7-102(c). The other four references are: W.Va. Code §46A-2-128(c) (collection of attorney fees on delinquent education loans); W.Va. Code §46A-2-103 (reference to federal higher education Act); W.Va. Code §46A-2-138 (return of fees of correspondence educational course); and W.Va. Code §46A-6-102 (definition of “services”).

CCPA to apply to education, and in particular, private, parochial or church schools, or schools of a religious order, it would have done so explicitly (as it did with respect to the collection of educational loans in Article 2 of the CCPA). To go beyond these well-defined limits as urged by the AG, this Court would necessarily violate the intent of the Legislature and the constitutional rights of the schools, parishes and Diocese, as explained in the U.S. Supreme Court's settled jurisprudence (as discussed in detail below in Section F).

The Supreme Court has stated on many occasions that W.Va. Code §46A-6-104 is among the most broadly drawn provisions of the CCPA, is ambiguous, and must be construed before it can be applied. *State ex rel. Morrissey v. Copper Beech Townhome Communities Twenty-Six, LLC*, 239 W.Va. 741, 751, 806 S.E.2d 172, 182 (2017). The fact that W.Va. Code §§46A-6-104 does not include any *explicit* direction stating that the deceptive practices provisions apply to school safety issues leads to the conclusion that the act does not apply to Catholic School safety.

On the contrary, the Legislature has enacted comprehensive code sections governing education in the State of West Virginia, for both public and non-public schools, including school safety.¹⁴ The State Superintendent of schools is delegated with the authority to supervise the free schools- "public schools" of the State of West Virginia, and under certain circumstances, the private, parochial or church schools or schools of a religious order. W.Va. Code §18-3-1 et. seq. The State Superintendent of schools is directed to exercise such other powers and discharge such

¹⁴ In fact, in the Legislature set forth an education blue print for 2020 requiring: (5) *School environments that promote safe, healthy and responsible behavior and provide an integrated system of student support services.* --Each school should create an environment focused on student learning and one where students know they are valued, respected and **safe**. Furthermore, the school should incorporate programs and processes that instill healthy, **safe** and responsible behaviors and prepare students for interactions with individuals of diverse racial, ethnic and social backgrounds. School and district processes should include a focus on developing ethical and responsible character, personal dispositions that promote personal wellness through planned daily physical activity and healthy eating habits consistent with high nutritional guidelines and multicultural experiences that develop an appreciation of and respect for diversity. W.Va. Code Ann. §18-1-4 (Emphasis added).

other duties assigned to him, or as may from time to time be assigned to him by the Legislature and the State Board of Education. W.Va. Code §18-3-10.

In addition to granting certain powers to the State Superintendent, the Legislature created Article 28 of Section 18 of the West Virginia Code to specifically govern and regulate private, parochial or church schools, or schools of a religious order. Specifically, the Legislature set forth the following policy supporting non-public education:

In conformity with the constitutions of the United States and of West Virginia, it is the public policy of the State in matters of education that no human authority shall, in any case whatever, control or interfere with the rights of conscience or with religious liberty and that no person shall be enforced, restrained, molested or burdened, in body or goods, or otherwise suffer, on account of his or her religious opinions or belief, but all people shall be free to profess, and by argument, to maintain their opinions in matters of religion; and further be free to select their religious instructor, and to make for his or her support, such private contract as they shall please, and that religion, morality and knowledge being necessary to good government and the happiness of humankind, the means of education shall forever be encouraged. W.Va. Code §18-28-1.

While recognizing the public policy in favor of the creation of non-public schools, the Legislature also put into place a mechanism to monitor the “*health and safety*” of those students. In pertinent part, the following statutory requirements are applicable to private, parochial or church schools or schools of a religious order:

- (a) Each school shall observe a minimum instructional term of one hundred eighty days with an average of five hours of instruction per day;
- (b) Each school shall make and maintain annual attendance and disease immunization records for each pupil enrolled and regularly attending classes. The attendance records shall be made available to the parents or legal guardians;
- (c) Upon the request of the county superintendent, a school (or a parent’s organization composed of the parents or guardians of children enrolled in the school) shall furnish to the county board a list of the names and addresses of all children enrolled in the school between the ages of seven and sixteen years;
- (d) Attendance by a child at any school which complies with this article satisfies the requirements of compulsory school attendance;

(e) Each school is subject to reasonable fire, health and safety inspections by state, county and municipal authorities as required by law, and is required to comply with the West Virginia school bus safety regulations; and

(f) Each school shall establish, file and update a school specific crisis response plan which complies with the requirements established for it by the state board and the Division of Homeland Security and Emergency Management pursuant to section nine, article nine-f of this chapter.¹⁵

W.Va. Code Ann. §18-28-2 (Emphasis added). As set forth above, the Diocese and Catholic Schools are mandated to comply with state law concerning the health, safety, and welfare of its students. Moreover, the Legislature has been clear that the **only** mandated provisions¹⁶ that need to be met by non-public schools specifically deal with health and safety related matters:

No private, parochial or church school or school operated by any other religious group or body as part of its religious ministry or other nonpublic school which complies with the requirements of this article shall be subject to **any other provision of law relating to education except requirements of law respecting fire, safety, sanitation and immunization.**

W.Va. Code Ann. §18-28-6 (Emphasis added).

It is not disputable that the Legislature has regulated private schools in the above numerous statutory sections outside of the CCPA. It is also not disputable that the Legislature's intent was to create safe school environments outside the CCPA. "The Legislature finds that a safe and civil environment in school is necessary for students to learn and achieve high academic standards." W.Va. Code Ann. §18-2C-1. And, as established in section A, above, the Legislature

¹⁵ In addition to the above statute, the Legislature delegated to the West Virginia Division of Homeland Security and Emergency Management and the State Board of Education to prepare specific crisis response plans for all schools, including non-public schools. Private, parochial and religious schools are required to establish, file and update school specific crisis response plans, that include sexual abuse and harassment incidents. See W.Va. Code, §18-9F-9. Consistent with the crisis response requirements, the Governor of the State of West Virginia has established a "West Virginia Safe Schools Helpline" promoting a safe environment and sexual harassment reporting directions. The DWC complies with this provision as directed by the Division of Homeland Security.

¹⁶ The Legislature limited the reach of the regulation of non-public schools by stating: Any private, parochial or church school or school of a religious order or other nonpublic school complying with the provisions of this article may, **on a voluntary basis, participate in any state operated or state sponsored program otherwise made available to such schools by law.** W.Va. Code Ann. §18-28-4 (Emphasis added).

preempted the regulation of schools in West Virginia Code §18-1-1 *et seq.* leaving no authority for the AG to regulate schools.

As a result, the only conclusion is that the Legislature did not intend to also regulate the safety of Catholic Schools via the CCPA. Allowing the AG the ability to govern Catholic education by using a false or deceptive advertising claim is contrary to the public policy set forth by the Legislature. Thus, the AG cannot be permitted to expand his jurisdiction outside of consumer credit related activities using an overly ambiguous and broad provision of the CCPA.

D. THE AG'S COMPLAINT MUST BE DISMISSED BECAUSE IT FAILS TO ALLEGE ANY "UNFAIR OR DECEPTIVE ACTS OR PRACTICES."

The AG's Complaint contains two counts alleging violations of the CCPA. The claim in Count I alleges that the DWC failed to deliver advertised services pursuant to West Virginia Code §46A-6-104 which prohibits "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce...." [Complaint ¶¶ 67-72]. This allegation is based upon the theory that although the DWC's website contains language that it offers a safe learning environment for students in its schools and children attending its recreational camps, it failed to clearly and conspicuously disclose that the learning environment is not safe as advertised due to the historical claims of sexual abuse of minors by priests. [Complaint ¶ 71].

The AG's claim in Count II alleges that the DWC failed to warn of dangerous services pursuant to West Virginia Code §§46A-6-104 and 46A-6-102(7)(L) and (M). [Complaint ¶¶ 73-76]. West Virginia Code §46A-6-102(7)(I), (L), and (M) provide, in pertinent part:

Unfair methods of competition and unfair or deceptive acts or practices" means and includes, but is not limited to, any one or more of the following:

- (I) Advertising goods or services with intent not to sell them as advertised;
- (L) Engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding;

(M) The act, use or employment by any person of any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any goods or services, whether or not any person has in fact been misled, deceived or damaged thereby;

It should be noted that while the AG alleges that the DWC failed to warn of “dangerous services”, nothing in the CCPA contemplates such a claim. Nevertheless, both of the allegations are based upon language on the DWC website under the “Frequently Asked Questions” heading under the Catholic Schools section. Under the “How safe are the Catholic schools?” section, the language states:

Providing a safe learning environment is inherent in the mission of our Catholic Schools. School employees and volunteers must pass a national background check, be fingerprinted and trained according to the Diocesan Safe Environment Policy (VIRTUS).

Each school has an Emergency Response Plan for Emergencies that is put into practice on a regular basis. Safety measures are in place at all of our schools. [Complaint ¶ 23].

The gist of both of the AG’s claims are that the DWC, through its website, promised students that it provides a safe learning environment, but failed to do so because it failed to conduct background checks. There are several fundamental flaws in the AG’s claims. First, the claims rely on decades old allegations of abuse to claim that the current Catholic School environment is currently unsafe. Second, the claims fail to recognize the current and ongoing safe environment program acknowledged in the Complaint in Paragraphs 20 through 23. Third, although the AG includes camps in its claims, the safe schools environment language on the DWC’s website relied upon by the AG does not include any language regarding camps; thus, there can be no claims related to camps. Fourth, the Complaint fails to provide allegations that

support that an unsafe educational environment currently exists, much less that any such allegation would be in violation of the CCPA.

The AG's allegations must be viewed with the understanding that the CCPA limits the AG to a look back period of four years. W.Va. Code §46A-7-111. The allegations must also be viewed with the understanding that the AG must prove that the DWC violated the CCPA by selling services using "unfair or deceptive acts or practices" which requires that the DWC intended to *deceive, mislead, or confuse* in a consumer transaction. W.Va. Code §46A-6-102(7)); *See also State v. Bear, Stearns & Co.*, 217 W.Va. 573, 576, 618 S.E.2d 582, 587 (2005). When drafting the CCPA, the Legislature deemed it necessary to list sixteen categories of conduct that constitute "unfair or deceptive acts or practices" which all require that the violator create consumer "confusion or misunderstanding... or involves deceptive, false, or misleading statements and representations in connection with goods, services and businesses." *Id.*; *See also In re Dynamic Random Access Memory Antitrust Litig.*, 516 F.Supp.2d 1072, 1118 (N.D. Cal. 2007) (analyzing the WVCCPA). The AG has pled no such allegations in its Complaint.

If taken as true that two sentences on the DWC's website is an advertisement promising a safe school environment, the AG has failed to allege that the promise was violated during the four year look back period. Rather, the AG relies on sexual abuse events that happened well over 30 years ago (Condrón, Frobás, and an unnamed person) in addition to 20-year-old and more erroneous allegations that the DWC failed to conduct background checks on Ronald Cooper and an unnamed priest who were not accused of abuse in the DWC.

It also cannot be overlooked that the AG failed to adequately plead its W.Va. Code §46A-6-102 claims. The AG's allegations do not provide any allegations within the four year look back period to show that the DWC failed to provide a safe, quality Catholic education to its

students – the AG identified no parents making such a claim (§102(I)). The AG failed to identify any confused parents of Catholic School students (§102(L)). Finally, the AG failed to identify any Catholic School parents who relied on any alleged concealment of sexual abuse. (§102(M)). Given the saturated news reports over the decades related to sexual abuse claims in the church, the AG would be hard pressed to find any Catholic School parents who were not aware of the history.

E. THE AG IS NOT ENTITLED TO THE RELIEF REQUESTED IN HIS COMPLAINT.

In the Complaint, the AG requests three separate types of specific relief: (1) an Order permanently enjoining and restraining the Diocese from violating W.Va. Code §46A-104; (2) an Order imposing equitable relief available to the Court, including, but not limited to injunctive relief, restitution, and disgorgement; and (3) judgment against Bishop Bransfield and the Diocese and an order directing each of them to pay civil penalties for each and every willful and repeated violation of Chapter 46A of the West Virginia Code that it committed, as provided by W.Va. Code §46A-7-111(2). The AG is not entitled to such relief.

Under the CCPA, the extent of the AG's special authority to seek relief for consumers is generally set forth in W.Va. Code 46A-7-108 through -111. *See also, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 777-78, 461 S.E.2d 516, 523-24 (1995). The AG is authorized to file a civil action “to restrain a person from violating this Chapter and for other appropriate relief.” W.Va. Code 46A-7-108. The AG is also authorized to seek temporary relief when “there is reasonable cause to believe” violations of the CCPA are occurring or will occur. W.Va. Code 46A-7-110.

Although the AG is entitled to seek injunctive relief in an appropriate case under the CCPA, the relief that he seeks is moot since the wrongdoing he alleges occurred outside the

limitations period provided under the statute; none of the allegations deal with an extension of credit or terms of payment, and the area of education he seeks to regulate, safe schools, is covered by other specific legislative enactments directly addressing such issues for which he has no jurisdiction.

The CCPA also authorizes the AG to bring an action to restrain *creditors* from engaging in specific types of unconscionable or fraudulent conduct. W.Va. Code 46A-7-109. The AG does not allege that the DWC is a creditor; thus, this section is not applicable.

Finally, pursuant to W.Va. Code §46A-7-111(2), the AG is entitled to recover a civil penalty for willful violations, and if the violations are repeated, civil penalties of five thousand dollars for each violation may be assessed. The Code section limits damages to a four year look back period. The AG's Complaint fails to allege that any specific Catholic School parents were deceived or misled by the safe environment language of the DWC website. It also fails to allege any violations within the four year look back period. Thus, the AG has alleged no cognizable violations. Accordingly, the AG has not alleged recoverable damages and the Complaint must be dismissed.

F. THE AG'S UNLAWFUL EXTENSION OF THE CCPA VIOLATES THE DWC'S AND RELIGIOUS SCHOOLS' PROTECTED CONSTITUTIONAL RIGHTS OF RELIGIOUS FREEDOM AND FREEDOM OF ASSOCIATION.

In his effort to expand his authority under the CCPA to encompass the Catholic Church, the AG uses Catholic Schools as the doorway by which to enter the realm of separation of church and state because a direct attack on the Catholic Church is a too obviously impermissible route to take. To accomplish its subterfuge, the AG alleges that Catholic Schools are currently engaged in "unfair or deceptive acts or practices" when the DWC states on its website that it has a safe school environment. The AG alleges that the Catholic Schools are not safe as stated because,

decades ago, priests who had committed acts of child abuse were assigned to ministry in parishes. More specifically, the AG alleges that the website statement made by the DWC *after* its adoption of the Charter for the Protection of Children and Young People¹⁷ (“Charter”) in 2002, which reflects the implementation of the Charter’s “safe environment program”, is illegal because, in some years *prior* to the adoption of the Charter, it is alleged that five persons might have served in work associated with schools somewhere in the state. That rather shaky premise is proffered as the fulcrum for this Court to lever a broad set of ambiguous rules and regulations that would wholesale rewrite state law (as described above) and violate protected constitutional liberties of the religious schools, the parishes and the DWC (as described below).

1. **The AG’s Claims Against the Catholic Schools is an Impermissible and Unconstitutional Claim Against the DWC.**

The Legislature understands – and the settled constitutional law recognizes -- that religious schools are integral to the advancement of the religious ministry of the sponsoring church. E.g., *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Janasiewicz v. Bd. of Educ. of Kanawha Cty.*, 171 W. Va. 423, 426, 299 S.E.2d 34, 37–38 (1982). For this reason, the United States Supreme Court made it clear that the government cannot regulate the internal affairs of Catholic Schools with respect to how they reflect and relate to the directives of the Bishop. See generally *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Likewise the Supreme Court of Appeals has held that the “power of the civil courts to interfere with the internal operations of churches is severely limited by the First Amendment to the Constitution of the United States as applied to the states by the Fourteenth

¹⁷ The Charter was adopted by the U.S. Catholic Bishops meeting in assembly in Dallas, Texas in 2002. <http://www.usccb.org/issues-and-action/child-and-youth-protection/charter.cfm>. Each bishop is responsible to implement the Charter in his own Diocese, and the results of his implementation is subject to external and public audit. See Charter Article 9.

Amendment, and by W.Va. Const., art. III, §15.” *Bd. of Church Extension v. Eads*, 159 W. Va. 943, 948, 230 S.E.2d 911, 914 (1976).

To avoid the obvious unconstitutional impact of extending jurisdiction of the National Labor Relations Act (and the federal NLRB) to Catholic Schools, the Supreme Court construed the Act narrowly, stating that Congress did not intend such jurisdiction (because it could violate the church’s rights under the First Amendment). *Catholic Bishop of Chicago*, 440 U.S. at 507 (because there was “no clear expression of Congress’ intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.”). This case is an example of the doctrine of constitutional avoidance, in this kind of case cautioning government actors like courts and regulators, to construe their authority to avoid unconstitutional entanglement in protected religious exercises. Similarly, respecting the Legislature’s line-drawing, this court must be mindful to be vigilant of “excessive government direction of church schools and hence of churches ... ultimately intrud[ing] on religion and thus conflict[ing] with the Religion Clauses” (emphasis and citations omitted). *Catholic Bishop of Chicago v. NLRB*, 559 F.2d 1112, 1126 (7th Cir. 1977), *aff’d*, 440 U.S. 490 (1979). “[P]arochial schools involve substantial religious activity and purpose. The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid. . . . [T]he admitted and obvious fact that the *raison d’être* of parochial schools is the propagation of a religious faith.” 440 U.S., at 503 (*citing Lemon v. Kurtzman*, 403 U.S., at 628).

In this case, as described in detail above, the Legislature has already circumscribed the State’s legal authority, but the AG is urging this Court essentially to overlook the Legislature’s

judgment and both state and federal constitutional limitations. The AG invites this Court to sustain invasive scrutiny of the entirety of the DWC's child protection efforts, the adequacy of its detailed program to select and train employees and staff, parents and children. It would seek to set aside fifteen years of preventive efforts and revisit fifteen years of compliance audits, both to resolve this case and to provide for future oversight. That is precisely the kind of unconstitutional entanglement prevented by the First Amendment and Art.III, §15. As the U.S. Supreme Court counseled, it is not only the result of an investigation – a prosecution or penalty – “which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.” *Catholic Bishop of Chicago*, 440 U.S., at 502 (in the case the investigation of possible violations and future enforcement of the National Labor Relations Act). Thus, Catholic Schools are protected by the same Constitutional rights as the Catholic Church.

2. **The AG's Claims Against the Catholic Schools and the DWC Violates Their Right to Freedom of Religion.**

In a similar regulatory context involving economic oversight in the advertising of religious schools, the First Circuit concluded Puerto Rico's regulatory inquiry directed at the island's Catholic schools violated the First Amendment. *Surinach v. Pesquera de Busquets*, 604 F.2d 73, 75–76 (1st Cir. 1979). There, the Secretary of Consumer Affairs of Puerto Rico decided to investigate the cost of Roman Catholic schools in Puerto Rico. *Id.* at 74. The Secretary ordered the parochial schools to produce “specified documents and books and to furnish such information as the school's annual budgets for the three previous years; the source of their finances (registrations, donations, governmental and others); costs of transportation; the student cost per academic grade for registration, admission dues, activities, medical insurance, nourishment services, materials and school uniforms; the salaries paid to teachers,

administrative, maintenance and other personnel; book costs and invoices per grade and their resale prices as well as the names and addresses of book suppliers; and scholarships and the criteria upon which they were awarded.” *Id.* The First Circuit held that the Secretary’s effort violated the First Amendment. *Id.* at 74–75. Recognizing that “the gathering of information . . . is merely a first step” toward regulating the price of tuition for parochial schools. *Id.* at 75. The Court concluded that, in this context, “we cannot conceive nor have we been apprised of any rational end product use of this information which will not encroach on appellants’ First Amendment rights.” The court further explained that, “in the sensitive area of First Amendment religious freedoms, the burden is upon the state to show that implementation of a regulatory scheme will not ultimately infringe upon and entangle it in the affairs of a religion to an extent which the Constitution will not countenance.” *Id.* at 75–76. That is because “there does not have to be an actual trial run to determine whether the aid can be segregated, received and retained as to secular activities only, but it is sufficient to strike the aid down that a reasonable likelihood or possibility of entanglement exists.” *Id.* (quoting the Seventh Circuit’s opinion in *Catholic Bishop*, 559 F.2d, *supra* at 1126).

This case is no different from *Catholic Bishop* and *Surinach*. Here, the AG is attempting—for the first time and without express Legislative authority under the statute—to regulate on an ongoing basis the DWC’s current and future description of its internal child protection policies and compliance efforts through a radical extension of the CCPA and in the absence of any present evidence that the DWC is engaged in any practices subject to the CCPA or in violation of any person’s rights assured under the CCPA. The essence of the claimed extension of regulatory authority is that because (it is alleged) five persons associated with schools in decades past had committed misconduct, not only are the religious schools presently

unsafe but that ongoing regulatory authority is required for the future. Not only does this portend extensive present and future unconstitutional entanglement, but the very persistence of this litigation could act as a wedge between Catholic parents and the schools, parishes and Diocese, by inviting them to distrust Church leaders and abandon Catholic schools which are integral to faith formation in young people.¹⁸ As such, the exercise of illegal authority would poison the DWC's associational rights by State supervision of the relationship between the Church and its members. Given the magnitude of the constitutional concerns involved, and the absence of the intent of the Legislature to include religious schools under the purview of the CCPA, the AG could never overcome its burden "to show that implementation of a regulatory scheme will not ultimately infringe upon and entangle it in the affairs of a religion to an extent which the Constitution will not countenance." *Surinach*, 602 F.2d at 76. The AG's desire to direct and oversee the DWC's implementation of its safe environment program would be prohibited even if he had the actual statutory authority to act.

3. **The AG's Claims Against the Catholic Schools and the DWC Violate Their Right to Freedom of Association.**

Not only does the AG ask the Court to engage in this kind of entangling scrutiny and (if he succeeds) continuing enforcement, the enforcement action would unconstitutionally chill the DWC's associational rights with members and potential members, and would impose on the schools, parishes, and DWC a state-sanctioned set of communications (without any record basis in fact). Neither can be sustained under the First Amendment.

The AG's Complaint alleges that the DWC failed to deliver certain advertised services (Count 1) and failed to warn of dangerous services (Count 2) under the CCPA. The AG's position, therefore, is that the DWC had a duty both to speak and to interact with its members in

¹⁸ In fact, in some of his press releases, the AG has announced that he is actively seeking parishioners who will claim to be victims as part of this lawsuit.

a way that it says (notwithstanding the text of the CCPA or any basis in the record) complies with the CCPA. Even if the AG believes this is a matter of simple honesty and thus not a blatant extension of the CCPA,¹⁹ there are constitutional limits on what the AG can command.

Associational rights are among the most sacred protections in the First Amendment. In *N.A.A.C.P. v. Alabama*, for example, the Supreme Court recognized that “[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.” 357 U.S. 449, 460 (1958). The Court further recognized that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action . . . The governmental action challenged may appear to be totally unrelated to protected liberties. Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived to have the consequence of unduly curtailing the [First Amendment freedoms] assured [from State regulatory action] under the Fourteenth Amendment.” *Id.* at 462. In *N.A.A.C.P.*, the Court held that the organization did not have to disclose its membership lists to the State of Alabama because the state did not meet its burden of a compelling interest to overcome the chilling effect on the Association’s membership rolls that disclosure could bring. *Id.* at 466. *See also, e.g., Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656–57 (2000) (holding that New Jersey could not enforce anti-discrimination public accommodations laws in favor of expelled homosexual Boy Scout troop leader); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1160 (9th Cir. 2010) (explaining that “government must justify

¹⁹ One well-established limit on a church’s constitutional rights is fraud – in this matter, a present act of intentional deception specifically to mislead the Catholic people into selecting a Catholic school where their children would be in danger. Nothing that is argued here even remotely implies that the Diocese claims “that, under the cloak of religion, persons may, with impunity, commit frauds on the public. Certainly penal laws . . . punish such conduct.” *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940). But, paraphrasing the Supreme Court in *Cantwell*, to condition the Church’s education ministry on “a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.” *Id.* at 307.


its actions not only when it imposes direct limitations on associational rights, but also when governmental action would have the practical effect of discouraging the exercise of constitutionally protected political rights. Such actions have a chilling effect on, and therefore infringe, the exercise of fundamental rights. Accordingly, they must survive exacting scrutiny.” (internal quotations and citations omitted)).

Absent evidence of current wrongdoing and active deception (arising to the level of intentional fraud), there is no basis for the AG to maintain this lawsuit consistent with the federal and state Constitutions.

V. CONCLUSION

The Complaint must be dismissed for failure to state a claim upon which relief can be granted as neither the predicate acts nor the alleged violations come within the purview of the CCPA, much less, the AG’s authority and jurisdiction under the CCPA. Additionally, even if the Court would consider at this stage in the proceeding that such preemptory dismissal is premature, the cause of action and relief requested violate state and federal constitutional provisions that assure rights of freedom of religion and freedom of association; thus, must be dismissed nevertheless.

**DIOCESE OF WHEELING-CHARLESTON
AND MICHAEL J. BRANSFIELD,**
By Counsel

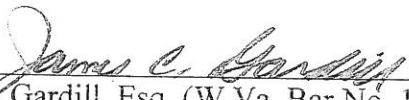

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 19~~th~~ day of April, 2019, the foregoing *Diocese of Wheeling-Charleston's and Michael J. Bransfield's Memorandum of Law in Support of Motion to Dismiss Plaintiff's Complaint* was served on opposing counsel by mailing a true copy via first-class U.S. Mail postage prepaid to:

Patrick Morrissey, Esq
State of West Virginia Attorney General
Post Office Box 1789
Charleston, WV 25326-1789



James E. Gardill, Esq. (W.Va. Bar No. 1335)
Edward M. George, III, Esq. (W.Va. Bar No. 5419)
Richard N. Beaver, Esq. (W.Va. Bar No. 6864)

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
PATRICK MORRISEY, ATTORNEY GENERAL,

Plaintiff,

v.

CIVIL ACTION NO. 19-C-69
Honorable Judge John D. Beane

DIOCESE OF WHEELING-CHARLESTON
And MICHAEL J. BRANSFIELD in his Capacity
as former Bishop of the Diocese of Wheeling-Charleston,

Defendants.

**DIOCESE OF WHEELING-CHARLESTON'S AND MICHAEL J. BRANSFIELD'S
MOTION FOR LEAVE TO EXCEED THE TWENTY PAGE MEMORANDUM LIMIT**

NOW COME the Defendants, the Diocese of Wheeling-Charleston and Michael J. Bransfield (collectively herein "DWC"), by and through its undersigned counsel, pursuant to Rule 22.01 of the West Virginia Trial Court Rules and requests that this Honorable Court grant it leave to exceed the twenty-page memorandum limit. In support of its Motion, Defendants submit as follows:

1. Defendants have timely filed its Motion to Dismiss and Memorandum of Law in support thereof in the Circuit Court of Wood County. Defendants' Memorandum of Law is approximately thirty (30) pages long.

2. Rule 22.01 of the West Virginia Trial Court Rules requires leave of Court to file memoranda in support of motions that exceed twenty pages.

3. Although Defendants' memorandum exceeds twenty pages, it is nevertheless as concise as possible for three reasons. First, it seeks to dismiss both counts of Plaintiff's two count, 76 paragraph Complaint. Second, it involves eight compelling reasons, including but not limited to, three U.S. Constitutional reasons to dismiss the Complaint. Third, justice will be

served by presenting all issues to be dismissed at the early stages of this civil action.


4. The Memorandum is only ten (10) pages over the twenty-page limit and it involves U.S. Constitutional issues related to governmental overreach.

WHEREFORE, Defendants request leave of Court for their Memorandum in Support of Motion to Dismiss to exceed twenty pages and for all other additional and further relief that the Court deems appropriate.

A proposed Order is attached hereto.

Dated the 18th day of April, 2019.

**DIOCESE OF WHEELING-CHARLESTON
AND MICHAEL J. BRANSFIELD,**
By Counsel


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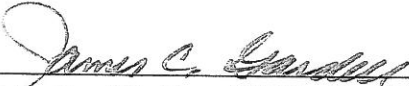
And

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the ~~17~~ day of April, 2019, the foregoing *Diocese of Wheeling-Charleston's and Michael J. Bransfield's Motion to for Leave to Exceed Twenty Page Limit* was served on opposing counsel by mailing a true copy via first-class U.S. Mail postage prepaid to:

Patrick Morrissey, Esq
State of West Virginia Attorney General
Post Office Box 1789
Charleston, WV 25326-1789



James C. Gardill, Esq. (W.Va. Bar No. 1335)
Edward M. George, III (W.Va. Bar No. 5419)
Richard N. Beaver, Esq. (W.Va. Bar No. 6864)

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
PATRICK MORRISEY, ATTORNEY GENERAL,

Plaintiff,

v.

CIVIL ACTION NO. 19-C-69
Honorable Judge John D. Beane

DIOCESE OF WHEELING-CHARLESTON
And MICHAEL J. BRANSFIELD in his Capacity
as former Bishop of the Diocese of Wheeling-Charleston,

Defendants.

**ORDER GRANTING THE DIOCESE OF WHEELING-CHARLESTON'S
AND MICHAEL J. BRANSFIELD'S MOTION FOR LEAVE TO EXCEED THE
TWENTY PAGE MEMORANDUM LIMIT**

On a previous day came the Defendants, the Diocese of Wheeling-Charleston and Michael J. Bransfield, by and through their undersigned counsel, James C. Gardill, Richard N. Beaver and the law firm of Phillips, Gardill, Kaiser and Altmeyer, pursuant to Rule 22.01 of the West Virginia Trial Court Rules and requested leave to exceed the twenty-page memorandum limit for Defendants' Memorandum of Law in Support of Motion to Dismiss.

WHEREFORE, the Court having reviewed the Motion, hereby finds that good cause to exceed the twenty-page limit has been shown and hereby GRANTS Defendants' Motion and Defendants' Memorandum of Law in Support of Motion to Dismiss may exceed the twenty-page limit.

The Clerk is Ordered to transmit attested copies of this Order to all counsel of record.

The Court notes all exceptions and objections to this Order.

Entered the ____ day of _____, 2019.

Honorable Judge John D. Beane, Judge

ATTORNEY GENERAL'S OFFICE

FROM

PHILLIPS, GARDILL, KAISER & ALTMAYER, PLLC

LAWYERS

61 FOURTEENTH STREET

WHEELING, WEST VIRGINIA 26003

To

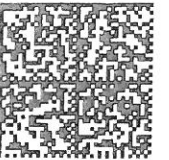
Patrick Morrissey, Esq.

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